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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 338

KALMAN GREENHILL, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on June 6, 1963.

CITATION TO OPINION BELOW

The Court of Appeals rendered no opinion. Its order of June 6, 1963, summarily affirming the denial of a motion for new trial, is unreported; it is reprinted in the appendix hereto. The District Court's order denying the motion, also unreported, appears in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1963. On July 3, 1963, Mr. Justice Stewart signed an order extending the time for filing this petition for writ of certiorari to and including July 22, 1963. On July 22, 1963, Mr. Justice Goldberg signed an order further extending this time to and including August 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, under Rule 33, Fed. Rules Crim. Proc., a federal district court is required to hold a hearing and make findings of fact respecting a motion for a new trial based upon newly discovered evidence where sworn allegations that the prosecutor had suppressed and concealed material exculpatory evidence favorable to the defendant are undenied and unrefuted.

CRIMINAL RULE INVOLVED

Rule 33, Federal Rules of Criminal Procedure:

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT OF THE CASE

This proceeding arises out of a motion for a new trial, based on newly discovered evidence, filed pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

In 1961 petitioner was convicted, following a jury trial in the United States District Court for the Southern District of New York, on three counts alleging that he had transferred assets of the Westco Steel Co. during 1955 in anticipation of bankruptcy and with intent to defeat the Bankruptcy Act, in violation of 18 U.S.C. §§ 152 and 2. Petitioner was sentenced to imprisonment for a year and a day on each of the three counts, the sentences to run concurrently.

The Court of Appeals for the Second Circuit affirmed the conviction in a *per curiam* opinion rendered in June, 1962. 305 F. 2d 289. On November 5, 1962, this Court—with Mr. Justice Douglas dissenting—denied a petition for a writ of certiorari. 371 U.S. 891; rehearing denied, 371 U.S. 943.

Petitioner then filed in the District Court a motion for a new trial under Rule 33 "on the grounds of newly discovered evidence and on the grounds that material exculpatory evidence in possession of the Government at the time of the trial was concealed." R. 2(Vol. I).* Petitioner, in his affidavit accompanying this motion, prayed "that a new trial be ordered, or, in the alternative, that a hearing be held to determine whether or not there are sufficient facts and circumstances warranting the granting of a new trial herein." R. 13(Vol. I).

*The certified record filed with the Clerk consists of three volumes, each separately paginated.

The newly discovered evidence submitted by petitioner related primarily to the financial condition of Westco Steel Co., a corporation controlled by petitioner that had been adjudicated a bankrupt on March 1, 1956, in a federal court in the Northern District of California. The indictment had charged that petitioner, in contemplation of that bankruptcy, fraudulently transferred from Westco to himself and to two other corporations controlled by him more than $50,000. Petitioner's defense was that these transfers were either legitimate payments for personal services or represented part of legitimate intercorporate relationships and that Westco's bankruptcy was due solely to diminished sales and increased expenses of that company. Basic to the defense, therefore, was a demonstration that the payments from Westco were not made in contemplation of bankruptcy and that the bankruptcy was in fact caused by economic difficulties that were unavoidable and unpredictable.

For defense purposes it was necessary to secure all relevant financial data relating to the bankrupt corporation for the period covered by the indictment, February 8, 1955, to March 1, 1956. And since Westco's financial records contained no entries after November 30, 1955, the more complete financial records compiled in the bankruptcy proceedings became of prime importance to petitioner's defense. Only there could he hope to trace all the financial events that culminated in the bankruptcy adjudication on March 1, 1956, which was also the terminal date of the period referred to in the indictment.

At the beginning of the trial and also during the course of the trial, petitioner moved for the production by the Government of a report in its possession made

by the accountant for the trustee in bankruptcy. This request was steadfastly resisted by the Government; and the District Court, without ever having seen the report, denied the motion for production. The Court of Appeals, in reviewing the conviction, sustained the District Court's action—again without the benefit of having the report before it—on the assumption that petitioner was not harmed by his failure to secure the report "since apparently it would not have been admissible as evidence, and was based on books which were available to the appellant." 305 F. 2d at 289.

In an affidavit submitted by the Government to the Court of Appeals, the attorney for the trustee in bankruptcy asserted that the report had been prepared as "a private report for the use and benefit of the Trustee and his counsel" so as "to lay the foundation, if any existed, for both civil and possible criminal action against Kalman Greenhill and others." R. 20 (Vol. I). It was further alleged in this affidavit that the report, which admittedly had been turned over to the Government for prosecution purposes, "never was and is not now a public record and has never been filed in any court." R. 20 (Vol. I).

The ensuing petition for a writ of certiorari, filed in this Court (No. 365, Oct. Term, 1962), confined itself to the question whether petitioner was entitled, under the provisions of the Bankruptcy Act and under the principles of fair judicial administration, to inspect and utilize this report. Following the denial of certiorari, 371 U.S. 891, petitioner set about to try to obtain a copy of this suppressed report. He found, among other things, that the report had been prepared on the authority of an order of the bankruptcy court and that the accountant preparing the report had been

paid $658 for his work by the trustee out of the funds of the bankrupt estate. R. 7(Vol. I). The report, however, had never been made a part of the formal files of the bankrupt estate, but had been kept separate and apart.

After diligent efforts, petitioner finally obtained the report from a successor to the accountant who had prepared it. See R. 16-18(Vol. I). This report, attached as an exhibit to the motion for a new trial (Ex. 8, and R. 21-54(Vol. I)), materially contradicted the testimony of the key Government witness, Special Agent William G. Harry, and the detailed financial schedules prepared by him.

The prime instance of this inconsistency relates to the treatment of a $58,200 item in the Westco financial records. The trial testimony of Harry indicated that this item, representing the acquisition cost of the North Hollywood plant of Westco, should be treated as an asset. But the accountant's report, R. 25 (Vol. I), revealed that "To the extent that this amount included cost of materials, labor and cost of work in progress, the loss shown in Statement of Profit and Loss—Exhibit B—would be increaesd."

In other words, the loss shown on the balance sheet of Westco of $26,283.13, based upon the treatment of this item as an "asset," should have been increased by the amount of and to the extent that this "inventory" was sold; and such a sale was confirmed by other testimony. This would have increased the total operating losses of Westco and thus would have clearly indicated—from the independent records of the bankruptcy proceeding—that the ultimate bankruptcy of the concern was the result of economic factors beyond

petitioner's control. It would have had a material impact upon his defense that the bankruptcy was not the result of withdrawals and payments to himself and other controlled corporations.

In short, the report contained exculpatory evidence useful to petitioner in his defense. From this report, the jury might well have believed that petitioner had not acted in contemplation of bankruptcy and that Westco's collapse was due entirely to adverse economic factors.

Additionally, in support of the motion for a new trial, petitioner submitted the affidavits of two individuals, Ralph J. Lockwood and Herbert Ziegler, who had been subpoenaed for the trial by the prosecution. Exs. 9 and 10; R. 55-60(Vol. I). These individuals, after advising the prosecutor that their dealings with petitioner revealed an honest effort by him to save Westco from financial ruin, were never called as witnesses by the Government and the nature of their testimony was never revealed to the petitioner, let alone the jury. The motion for a new trial asserted that the prosecution, knowing of the existence of this favorable testimony, had "the basic duty to make a full disclosure." (R. 13(Vol. I)).

The motion for a new trial was filed on March 26, 1963, and made returnable in the District Court on April 1, 1963. Thereafter, without any response or opposing affidavits being filed by the United States Attorney, the motion papers filed by petitioner were mailed by the Clerk of the District Court to Judge Thomas F. Murphy; the trial judge, who was then on vacation somewhere in Europe. On April 17, 1963, Judge Murphy wrote the following endorsement on the motion papers:

"United States v. Kalman Greenhill. Motion Denied—This is an Order—No Settlement Necessary.

Dated: April 17, 1963

/s/ THOS. F. MURPHY
U.S.D.J."

The papers were returned by mail to the Clerk, who received and filed them on April 23, 1963.

Thus the District Court held no hearing on the motion and had before it no opposition and no contrary evidence by the Government. No opinion was filed and no statement or findings of fact were made. Similarly, the Court of Appeals, while holding an oral hearing, summarily affirmed in open court the District Court's action without any contradiction in the certified record before it of the truth of the serious allegations made in the motion for a new trial.

REASONS FOR GRANTING THE WRIT

The decision below necessarily raises a vital and unresolved problem in the administration of Rule 33 of the Federal Rules of Criminal Procedure. May a motion for new trial, premised on newly discovered evidence which allegedly exculpates the defendant and which allegedly was suppressed and concealed by the prosecution, be summarily denied without a hearing and without findings in the absence of any kind of opposition by the Government?

That question does not appear to have been answered by any definitive case arising under Rule 33. But the only conceivable answer was in effect supplied by this Court in *Pyle* v. *Kansas*, 317 U.S. 213, 216, dealing with

an alleged suppression of favorable evidence by the prosecution in a state criminal proceeding:

> "These allegations [as to the use of perjured testimony and the deliberate suppression of favorable evidence] sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney* v. *Holohan*, 294 U.S. 103. They are supported by the exhibits referred to above, and *nowhere are they refuted or denied*. The record of petitioner's conviction, while regular on its face, manifestly does not controvert the charges that perjured evidence was used, and that favorable evidence was suppressed with the knowledge of the Kansas authorities. *No determination of the verity of these allegations appears to have been made.* The case is therefore remanded for further proceedings." [Emphasis added.]

Here, as in *Pyle*, serious allegations have been made, amply supported by affidavits, that the prosecution suppressed material evidence that might have convinced the jury of petitioner's innocence. Nowhere have those allegations been refuted or denied. Nor has any determination been made of the verity of the allegations. In this context, a summary and unexplained denial of the motion is as intolerable as it was in the *Pyle* case. And what was considered improper in terms of the Constitution must certainly be considered improper under Rule 33.*

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* Query whether Judge Murphy had power or jurisdiction to act summarily, without the consent of the petitioner or the Government, while on vacation in Europe, far beyond the geographical boundaries of the District Court's jurisdiction. Cf. Federal Civil Rule 77(b): "... but no hearing, other than one *ex parte*, shall be conducted outside the district without the consent of all parties affected thereby."

While this Court has warned against abuse of motions for new trials in federal criminal cases, it has also recognized that "a defendant should be afforded the full benefit of this type of rectifying motion." *United States* v. *Johnson*, 327 U.S. 106, 113. Petitioner submits that "the full benefit" must encompass the right to a hearing and a factual determination of the verity of so serious a challenge to the fairness of the prosecution as has here been made. The gravity of this type of challenge, a gravity of constitutional proportions, has been recently emphasized by this Court in *Brady* v. *Maryland*, 373 U.S. 83, 87, holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See also *Napue* v. *Illinois*, 360 U.S. 264, 269.

Not only does such summary and unexplained denial of petitioner's motion raise serious questions under Rule 33 but it also frustrates any meaningful appellate review of the denial. It is impossible for an appellate court to determine if the trial judge tested the motion on the basis of whether the newly discovered evidence was such as "would probably produce an acquittal," *Johnson* v. *United States*, 32 F. 2d 127, 130 (C.A. 8), or on the basis of "whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it"; *Griffin* v. *United States*, 336 U.S. 704, 709. It is equally impossible for an appellate court to determine the extent to which the trial judge abused his discretion in denying the motion.

Indeed, the District Court's action was such as to force the Court of Appeals to do just what this Court in *United States* v. *Johnson*, 327 U.S. 106, 113, said it should not do—i.e., "sit to try de novo motions for a new trial." Such a procedure, of course, deprived petitioner of any chance of pointing out or seeking review of the precise respect in which the District Court erred.

The proceedings on direct appeal from petitioner's conviction, culminating in the denial of certiorari last term, supply no answer to the instant problem. The issue there became refined to one of whether the accountant's report should have been produced before or at the trial. Since the report was at no time produced by the Government, no determination was or could have been made as to its evidentiary qualities or impact. Only after the subsequent efforts of petitioner produced that report did its impact become clear, an impact compounded by its deliberate suppression by the prosecution.

The problem thus raised by the judgment below is plainly important in the administration of criminal justice in the federal courts and warrants plenary review by this Court. When serious and undenied charges of suppressed evidence have been made in a motion for a new trial, the principle that a federal prosecutor must "refrain from improper methods calculated to produce a wrongful conviction," *Berger* v. *United States*, 295 U.S. 78, 88, would seem to dictate against a cavalier denial of the uncontested motion. "In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecu-

tion toward ensuring a conviction." *United States* v. *Zborowski*, 271 F. 2d 661, 668 (C.A. 2).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 5, 1963.